

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BEMIS COMPANY, INC.

Cases 18-CA-202617

and

**GRAPHIC COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 727-S**

**18-CA-205446
18-CA-205920
18-CA-205927
18-CA-207874
18-CA-210936
18-CA-211086**

BEMIS COMPANY, INC.

and

Case 18-CA-209515

PHILLIP A. McMEINS, An Individual

**RESPONDENT BEMIS COMPANY, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION IN REPLY TO GENERAL
COUNSEL'S ANSWERING BRIEF**

Dated October 23, 2019.

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I. Linda Hesler's Termination was lawful.

There is no dispute that Linda Hesler repeatedly made defective product and that she had progressed on Respondent's progressive discipline track prior to her discharge. The ALDJ found "that the record evidence establishes Hesler had multiple quality issues prior to her discharge" and that "Respondent followed its established progressive policy, issuing her a verbal warning, written warning and final warning within a 1-year period before terminating her." (ALJD p. 35). This finding should have led the ALJ to make the reasonable decision that Hesler's termination did not violate the Act. The record evidence demonstrates that Hesler had a long history of quality issues, for which Respondent issued discipline. Likewise, the evidence shows that Respondent ultimately terminated Hesler because of 180 errors discovered on a 100 percent check order after she admittedly failed to do the check, and after she had progressed on Respondent's progressive discipline policy to the point of termination. Hesler admittedly failed to do her job and was terminated. That is not a violation of the Act.

In support of the ALJD, General Counsel argued that she only should have been disciplined based on an objective numerical formula, which Bemis had never used and the implementation of which would have changed the status quo and violated longstanding Board law. *See Alwin Mfg. Co.*, 314 NLRB 564 (1994) (production standards are a mandatory subject of bargaining). Record evidence is clear that Bemis always applied a root cause analysis to determine whether discipline was appropriate. (Tr. 2080). That is, if the reason for a defect could not be identified, no discipline would be issued. Phil McMeins, a former department manager at Bemis, advocated for a different standard prior to Hesler's termination. (Tr. 546-47). He proposed to unilaterally dispose of the historical root cause analysis and substitute an unidentified numerical standard. This "defect rate," which did not consider the actual cause of the problem, was a numerical standard that Respondent

had not previously utilized and did not have the legal right to implement. (Tr. 2083-84; 2061-62). Had Respondent unilaterally changed its longstanding disciplinary standard to this numerical formula, General Counsel surely would have issued a complaint for violating the status quo.

Moreover, the ALJD's finding regarding Hesler's termination does not align with the Board's holding in *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019). Respondent does not argue that the Board's holding in *Electrolux* "wipe[s]" pretext from the *Wright Line*, 251 NLRB 1083 (1980), analysis. (GC's Answering Br. at 4). Rather, the Board in *Electrolux* held that pretext is not a substitution for evidentiary proof. Here, the record establishes and the ALJD found that Hesler had been issued a final warning prior to her termination. (ALJD p. 35). Hesler admitted that she failed to perform the required check, resulting in 180 defective bags. (Tr. 973). Consequently, Respondent had a legitimate business reason to terminate Hesler, and that decision fits squarely within the Board's holdings in *Wright Line* and *Electrolux*.

II. Bemis Has Not Unlawfully Refused to Provide Information to the Union.

The requests for information at issue were all made under and pursuant to *Total Security Management*, 364 NLRB No. 106 (2016) to forestall discipline. General Counsel now joins Respondent's position that *Total Security Management* should be overruled. (GC Answering Br. at 30). The information request in question was made by the Union as part of the *Total Security Management* pre-disciplinary procedure. (GCX 407). In the absence of *Total Security Management*, discipline would have been issued and there would have been no information request. The information request was inextricably linked to *Total Security Management* and cannot stand in its absence.

Notwithstanding Respondent's position that *Total Security Management* should be overturned, Respondent maintains that it never refused to provide information to the Union.

Respondent promised to “provide further response to [the Union’s] allegation” upon receipt of the requested clarification. (GCX 407, p. 9). The Union never responded. (Tr. 1684-85). When a union decides not to respond to a clarification request, it runs the risk of not having the information provided. *See Du Pont Dow Elastomers, L.L.C.*, 332 NLRB 1071, 1085 (1997). The ALJD ignores the testimony of the only Union witness called on this point. Johnson testified that he “didn’t ask for any more information, because [Rutt] was already giving [him] the information [he] requested.” (Tr. 1684-85). The clear record evidence establishes that Respondent did not violate the Act by refusing to provide the Union with requested information, particularly given the Union’s failure to clarify what, if anything, was missing. Therefore, the ALJD should be reversed.

III. Bemis’ Decision to Layoff Kent Morlan Was Lawful.

The ALJD concluded that Ink Maker Kent Morlan’s termination violated the Act. The ALJD concluded that Morlan’s job elimination should not be reviewed under *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). This ignores the record evidence that job eliminations like Morlan’s (and both voluntary and involuntary layoffs in general) regularly occurred at the Centerville plant. Donna Zaputil confirmed that in early June the Union was alerted that layoffs were impending, that she suggested, and the company then implemented, voluntary layoffs to stave off the immediate need for involuntary layoffs, and ultimately conceded to involuntary layoffs. (See Tr. 339; Tr. 340-43, 344-45; Tr. 1266). Bemis presented evidence that employees, like Linda Hesler and Bryan Newman, had been laid off or their positions eliminated due to lack of work. (Resp. Ex. 16; Tr. 769-71; Tr. 778). Despite this evidence of an established practice of job eliminations and layoffs at Bemis, ALJD concluded that *Raytheon* does not apply. *Raytheon* does not, nor should it, require a rigid, undefined quantitative standard. Because Bemis offered credible evidence that terminations like Morlan’s had occurred in the past, Bemis satisfied the *Raytheon* standard. Therefore, no Section 8(a)(3) violation occurred.

The ALJD concluded that Bemis and the Union's bargaining over Morlan's layoff was insufficient. Bemis met with the Union twice before the layoff. (Tr. 364; Tr. 371; GC Exhibit 12, at 3). On both occasions, the Union asked for Morlan to be moved to another position. (*Ibid.*). However, there were no open positions. (Tr. 372). When Bemis began to ramp up production just two month later, they held a third meeting regarding Morlan, and the Union requested that he be recalled. Bemis agreed and Morlan returned to employment, only to voluntarily quit after just one day. (Tr. 1244-45). Bemis clearly satisfied any bargaining obligation.

Finally, the ALJD concluded that Bemis terminated Morlan, who was union-neutral, over Bradshaw, who was anti-union in violation of the Act. In arguing that this decision should be upheld, General Counsel concedes that it is not "arguing about Respondent's acquisition and implementation of the Nova Flow system." (GC Answering Br. at 15). To be sure, Morlan's initial failure to correctly program the NOVAFLOW system extended his time at Bemis. Prior to NOVAFLOW, Morlan was the principal employee who used the X-Rite machine to manually calculate the ink formulas. Once the ink formula was calculated (Morlan's job), the ink was blended (Bradshaw's job). Once the NOVAFLOW system was correctly programed, Morlan only needed to use the X-Rite machine to prepare a new formula, about 5 times a week, rather than using it for every formula regardless of how long it had been used. This upgrade, as well as other improvements brought about by the NOVAFLOW system, reduced Morlan's responsibilities to watching volatile organic compound waste being loaded onto trucks for about two hours, every other week. (Tr. 846-47; Tr. 854). These are the facts as Morlan understood them and as they actually existed. General Counsel's and the ALJD's failure to grasp the technical workings of Bemis' manufacturing process led conclusions of discrimination. Accordingly, the ALJD's conclusion that Bemis violated the Act by discriminatorily terminating Morlan should be reversed.

IV. The Agreed-Upon Voluntary and Involuntary Layoffs Were Lawful.

As discussed extensively in Respondent's opening brief, and again as explained above, Bemis engaged in a long-established past practice when it decided to first implement voluntary and then involuntary layoffs in the face of a business slowdown. Bemis bargained with the Union in good faith prior to the implementation of layoffs and actually reached agreement on the voluntary before involuntary process with the Union representatives. (Tr. 340-45; Tr. 1261). Accordingly, the ALJD's findings on this issue should be reversed.

V. Bemis Did Not Unlawfully Present Bargaining-Unit Employees with the SUB Plan.

Again, the ALJD refused to apply *Raytheon* when Bemis presented separated employees with the SUB Plan. First, it cannot be overstated that presenting all employees with the SUB Plan maintained the status quo and any deviation from that established past practice would have in fact violated the Act, ERISA and the IRC. Bemis could no more unlawfully bypass the Union by issuing the SUB Plan benefit notices than by issuing COBRA, health, or 401K enrollment or entitlement notices either at the time of hire or during the open enrollment period. The ALJD takes a cramped reading of the SUB Plan's terms and fails to find that the separation agreement is an inextricable component of the SUB Plan. A specific term and requirement of the SUB Plan is that in order to receive the benefits, the individual must execute a Separation, Release and Waiver Agreement. (Tr. 1909; GC Ex. 38, at 2). The ALJ cannot uncouple this component from an ERISA Plan. Because Bemis non-discriminatorily maintained the status quo and complied with ERISA by offering the SUB Plan benefits, the ALJD should be reversed.

VI. Bemis did not violate the Act by Implementing a 24/7 Continuous Operation.

The record evidence demonstrates that the Union and Respondent began bargaining over the move to a 24/7, continuous work schedule in October 2017. On October 12, 2017, Rutt sent Johnson a letter requesting "to begin discussions with [him] over how and when [Respondent]

would move to 24/7, how [they] would structure shifts and the manner in which [they] would staff those shifts.” (GCX 410, at p. 2). Per Johnson’s testimony, discussions regarding the move to a continuous, 24/7 schedule began that same day and continued into late November 2017. (Tr. 1686-87). On November 3, November 8, and November 14, 2017, Respondent and the Union had meetings to discuss the continuous shift operation. (Tr. 1979; Tr. 1981-82; Tr. 1986-87; Tr. 1996-97). On November 3, Zaputil gave Livingood a mock-up of the Extrusion Department, which would eventually become the model for the entire plant. (Tr. 1982). On November 8, the Parties discussed implementing 8-hour shifts, which the Union wanted, instead of 12-hour shifts, which Respondent originally proposed because that was how Extrusion had been operating. (Tr. 1993-94; GCX 411; 412). On November 14, Respondent and the Union again discussed implementing 12-hours shifts, instead of 8-hour shifts, after Bemis leadership determined it did not have enough employees to make the 8-hour shifts work. (Tr. 1997-98). During this meeting, Johnson told Livingood to move forward with implementation of the 12-hour shifts and they could deal with any fallout later. (Tr. 1998).

Following the discussions on November 14, 2017, Livingood sent Johnson an email summarizing the agreed upon plan and outlining the recommended schedule. (GCX 414). This schedule was largely based on Extrusion, which had been on a 24/7, continuous operation “forever” and had been a central part of the discussion regarding the National Beef scale-up. (Tr. 329). Johnson never responded to this email, never contacted Livingood between November 15 and November 21, and in fact, never raised any issues with the continuous operation or twelve-hours shifts in a meeting with Livingood on November 21, 2017. (Tr. 2003; 2006-07). The ALJD ignores that Johnson did not object or even respond to the November 14 email until asking for a “reset” on November 30, 2017. (Tr. Tr. 2006-07). Bemis began the canvass for shift preferences

on November 15, 2017. No one from the Union objected to Bemis implementing the 12-hour shifts because that the Parties actually agreed to do so. Therefore, the ALJD's finding that Respondent did not afford the Union notice and the opportunity to bargain should be reversed.

VII. Bemis Did Not Refuse to Meet at Reasonable Times

"By any objective measure, the number of times the Respondent and Union have met to bargain is substantial." (ALJD p. 64). Respondent agrees and the ALJD's analysis should have ended with this finding. Section 8(d) of the Act requires parties "to meet at reasonable times." Respondent adhered to this standard. Since bargaining began in August 2016, Respondent has bargained with the Union on 55 or 56 occasions (Tr. 13; Tr. 1206; GC Ex. 520).¹ Respondent met with the Union regularly and without delay. Once the ALJD found the Parties had a "substantial" number of meetings, this allegation should have been dismissed. Should the Board adopt the ALJD's finding, then all future cases will be measured against a "50 meetings is not enough" standard. In effect, the Board would be adopting a non-existent standard left entirely to the discretion of General Counsel.

VIII. Bemis Never Engaged in Surface Bargaining.

The ALJD equates a failure to reach agreement on specific subject areas with Bemis engaging in surface bargaining. But the ALJD's conclusion is premised entirely upon Bemis' bargaining philosophy and fails to consider that the Union's chief spokesperson, Phil Roberts, came to the bargaining table armed with his own philosophy. Roberts testified he had a "mandate" from membership and that "[a]ll of our proposals are meant to put restrictions on the Company's right to do one thing or another." (Tr. 1377; Tr. 2142). Roberts even candidly testified that

¹ General Counsel alleges that Respondent gave "no citation" that the parties bargained on 55 or 56 occasions. But, Phil Roberts, the Union's lead negotiator and witness, testified that the parties were "55, 56 meetings into the process" by the time he testified at the hearing. (Tr. 1206). Moreover, in its opening statement, General Counsel conceded that "the parties [had] met on more than 50 days so far," which had "to be a record for this type of allegation." (Tr. 13).

“rightfully or wrongfully, I guess it’s against the book” to bargain in this way. (Tr. 942.) The ALJD does not even mention this revealing testimony, but rather cabins the “mandate” to one subject (promotions and transfers) and moves on. Laying full blame at Bemis’ feet fails to consider the full record, which shows that Roberts’ bargaining tactics significantly delayed reaching final agreement. To be sure, the evidence shows *hard bargaining*, which is lawful under the Section 8. *See, e.g., ACL Corp.*, 271 NLRB 1600, 1603 (1984) (citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973)). But it was hard bargaining by both sides.

The ALJD found that Bemis’ away-from-the-table conduct evidenced at-the-table, bad-faith bargaining. The Board is “reluctant to find bad-faith bargaining exclusively on the basis of a party’s misconduct away from the bargaining table.” *St. George Warehouse, Inc.*, 341 NLRB 904, 911 (2004) (citing *Litton Sys.*, 300 NLRB 324, 330 (1990)). Moreover, there has been no showing that Bemis’ away from the table conduct influenced Haberman’s objectives at the table. *See, e.g., River City Mechanical*, 289 NLRB 1503, 1505 (1988) (holding that where there is “no showing that the provocative and unlawful away-from-the-table statements of the Respondent’s officials influen”farced the aims or attitudes” of its chief negotiators, Respondent’s away-from-the-table conduct was not relevant to a showing of bad-faith bargaining); *In re Reichhold Chemicals, Inc.*, 288 NLRB 69, 71 (1988) (holding “the supervisor’s threat, which was found to be violative of Section 8(a)(1),” as well as other supervisory statements cited by the judge, are not sufficient to establish that Respondent intended to evade its obligation to bargain in good faith). Thus, Bemis’ away-from-the-table conduct is evidence of nothing as it applies to a finding of surface bargaining.

The ALJD’s analysis also highlights the problems of bringing a truncated surface bargaining charge when the parties’ negotiations are ongoing and they have not reached impasse on any issue, great or small. Bargaining is a dynamic process. *See, e.g., The Developing Labor*

Law: The Board, the Courts, and the National Labor Relations Act, 13.I.A (John E. Higgins, Jr. ed., 7th ed. 2018) (“The duty to bargain in good faith is an evolving concept, rooted in statute.”); Rafael Gely, *Collective Bargaining and Dispute System Design Dispute System Design: Justice, Accountability, and Impact*, 13 University of St. Thomas L.J. 218, 225 (2017). Simply because at some point in the bargaining process parties have reached only partial or tentative agreements on key provisions in the contract does not mean they will never reach agreement on other provisions. Parties will routinely hold onto items that are otherwise acceptable perhaps to package or trade for other items. Failure to reach agreement on issues during the middle of bargaining, might be evidence of surface bargaining, as the ALJD concluded. But it might simply be evidence of a party attempting to capitalize on a strength or minimize a weakness. When an ALJ fails to understand the dynamic process of ongoing bargaining, it is easy to see how he reached an incorrect conclusion. Where there is no evidence that the Parties had reached an impasse on any specific subject, let alone an overall impasse, a finding of bad faith cannot be supported. This was an ongoing dynamic process that was far from any deadlock. Haberman and Roberts both agreed that they were engaging in hard bargaining meant to maximize rights for their clients. Examining all the evidence points to this necessary conclusion.

IX. Bemis’ Handbook Policies Were Lawful.

Bemis handbook policies regarding employees’ use of social media and off-duty access to company property are not rules employees would “reasonably construe” to infringe on Section 7 rights, despite the ALJD’s conclusions to the contrary. *The Boeing Co.*, 365 NLRB No. 154 (2017). Indeed, the testimony from Senior Human Resources Director Chisti Dees evidences the practical reasons for these policies. (Tr. 1903-23.) They “apply to the everydayness of [an employee’s] job,” as they are meant to protect confidential information and employee safety, similar to those rules

in *LA Specialty Produce Company*, 368 NLRB No. 93, slip op. 1 (2019) (quoting *Boeing*, 365 NLRB No. 154, slip op. at 2). Bemis' social media policy is like a civility rule. The Board recently held in *Coastal Industries, Inc. d/b/a Coastal Shower Doors* Case 12-CA-194162 (Aug. 30, 2018)—which General Counsel does not address—that Coastal Industries' more restrictive social media policy did not violate Section 8(a)(1). Bemis' social media policy should be similarly upheld. Additionally, Bemis' off-duty access to company property policy should be upheld because it is facially neutral and satisfies *Boeing*, and even if *Tri-County Medical Center*, 222 NLRB 1089 (1976) applied here, the off-duty access policy withstands scrutiny.

X. The Board Should Overrule Total Security Management.

Respondent concurs with General Counsel's position that *Total Security Management*, 364 NLRB No. 106 (2016), should be overruled, as explained in Sect. II of this brief. (General Counsel's Answering Br. at 30). Respondent reincorporates its argument in its brief in support of its exceptions with regards to the Union's conflicting argument.

Dated at Milwaukee, Wisconsin, the 23rd day of October 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of October, 2019, the foregoing pleading, **RESPONDENT BEMIS COMPANY, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION IN REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF**, was electronically filed with the NLRB, using the NLRB's filing system and, served upon the following individuals by Email or U.S. Mail:

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